IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21/11/2002

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THE HONOURABLE MR.JUSTICE M.KARPAGAVINAYAGAM

S.A. NO.1115 OF 2002
and
C.M.P. NO.8991 OF 2002

1. Ponniammal
2. Murugan .. Appellants

-Vs-

1. Pachiammal @ Pavunayal
2. Muthayammal
(person of unsound mind,.
rep. by next friend
1st respondent Pachiammal @
Pavunayal)

3. Pachiannan .. Respondents

Second appeal against the judgment and decree dated 8-1-2002 in A. S. No.25 of 2000 on the file of the Sub-Court, Bhavani, Erode District against the judgment and decree dated 3-11-1999 in O.S. No.20 of 1996 on the file of the Additional District Munsif Court, Bhavani, Erode District.

!For appellants: Mr. A.K. Kumaraswamy

^For respondents: Mr.T.Murugamnickam for R1

:JUDGMENT

The respondents 1 and 2 filed a suit for declaration of their title to the suit properties and for recovery of possession or in the alternative, for partition and separate possession of their 2/3 share with past and future mesne profits against the defendants 1 and 2, the appellants herein.

2. The suit was decreed by the trial Court in favour of the plaintiffs, holding that they are entitled to entire suit properties. Aggrieved by the same, the defendants 1 and 2 filed an appeal before the lower appellate Court, which in turn confirmed the judgment and decree passed by the trial Court. Hence, the second appeal by the appellants/defendants 1 and 2.

3. According to the plaintiffs, they being the daughter and wife of Chinna Perumal Gounder respectively, are entitled to have declaration of title to the suit properties, since in 1974, the said Chinna Perumal Gounder died intestate. The defendants 1 and 2, namely, the second wife and her son respectively of the said Chinna Perumal Gounder, filed a suit for permanent injunction against the plaintiffs and the same was decreed by the trial Court, but however, dismissed by the appellate Court which was confirmed by this Court. During the pendency of the said suit, the defendants trespassed into the suit properties and took possession. Since it was already decided in the said suit that the first defendant was not the legally wedded wife of Chinna Perumal Gounder, the defendants would not be entitled to any share. Consequently, the plaintiffs filed the present suit claiming declaration and recovery of possession and in the alternative, they claim 2/3 share in the event of the Court coming to the conclusion that the second defendant was born to Chinna Perumal Gounder through the first defendant.

4. According to the defendants, the marriage between the second plaintiff and Chinna Perumal Gounder already got divorced in the year 19 71 and after the divorce, the said Chinna Perumal Gounder married the first defendant, namely, Ponniammal and out of the said wed-lock, the second defendant, namely, Murugan was born. Though one other female child, by name, Chinna Akkal was born, she died later. Even though in the earlier suit, it was decided that the marriage between Chinna Perumal Gounder and the first defendant was not a valid one, the second defendant would be entitled to his share by virtue of Section 16 of the Hindu Marriages Act.

5. The trial Court, after framing necessary issues, considered the materials placed before the Court by both parties and decreed the suit in favour of the plaintiffs. As noted above, the said finding was confirmed by the appellate Court in the appeal filed by the defendants.

6. While assailing the judgments impugned, learned counsel appearing for the appellants/defendants would submit that after 1976 amendment in the Hindu Marriages Act, as per Section 16(1) of the Act, the off-spring of a void marriage is declared to be legitimate and under Section 16(3) of the Act,

illegitimate children are conferred with the rights in the property of their parents and that both the Courts have not correctly applied the said provision of Section 16(3) to the present facts of the case. As such, there is a substantial question of law relating to overlooking of the words employed in Section 16 of the Hindu Marriages Act by both the Courts below.

7. I have heard learned counsel for the first respondent, who also represents the second respondent in view of the fact that she is of unsound mind, on the above aspects.

8. The substantial questions of law mentioned in the memorandum of the grounds of second appeal are as follows:-

"i. Whether the Courts below are right in holding that Section 16 of the Hindu Marriages Act is only prospective, overlooking the words employed in Section 16 of the Hindu Marriages Act?

ii. Are the Courts below right in holding that on the date of death of Chinna Perumal Gounder, the 2nd appellant was not legitimatised as a heir and as such, the succession got opened only in the year 19 74 and not subsequently as contended by the defendants?"

9. On going through the judgments impugned and the other records, it is clear that in the earlier suit, it was decided by the civil Court that the first defendant is not the legally wedded wife of Chinna Perumal Gounder, and as such, the second defendant becomes an illegitimate son of Chinna Perumal Gounder. In the present suit also, both the Courts below would hold that the second defendant is an illegitimate son of Chinna Perumal Gounder through the first defendant.

10. Under those circumstances, the question to be considered is " whether the second defendant would be entitled to his share by virtue of Section 16 of the Hindu Marriages Act?"

11. Both the Courts below, in my view, overlooked the actual meaning of the words employed in Section 16 of the Hindu Marriages Act (as amended by 1976 Act) and rejected the contention of the defendants 1 and 2 with reference to their claim for 1/3 share, merely on the ground that the amendment came into force only in 1976 and Chinna Perumal Gounder died in the year 1974 and that the suit properties are joint family properties. Both these grounds are wrong. These points have been decided by the Supreme Court in RAMESHWARI DEVI VS. STATE OF BIHAR (AIR 2000 SC 735), P.E.K. KALLIANI AMMA VS. K.DEVI (AIR 1996 SC 1 963) and by the Andhra Pradesh High Court in C. NIRMALAMMA VS. G. SEETHAPATHI (AIR 2001 A.P. 104).

12. In the decision of the Supreme Court reported in AIR 1996 SC 1963 (supra), it is held as follows:-

"79. In view of the legal fiction contained in Section 16, the illegitimate children, for all practical purposes, including succession to the properties of their parents, have to be treated as legitimate. They cannot, however, succeed to the properties of any other relation on the basis of this rule, which in its operation, is limited to the properties of the parents.

80. Obviously, appellants 2 to 6 were born prior to the date on which amendments were introduced in Section 16(1), and consequently they would, notwithstanding that the marriage between their parents had taken place at a time when there was a legislative prohibition on the second marriage, be treated as legitimate, and would, therefore, inherit the properties of their father, Raman Nair, under Section 16(3) of the Act."

13. A reading of the observations made in the above said decisions would clearly indicate that an illegitimate son is entitled to enforce a partition in the property of his parents. In other words, he is entitled to the rights of survivorship, as he becomes "co-parcener" with the legitimate son. He is a member of the family and has a status as a son and by virtue of that, he is entitled to the right of survivorship. Section 16 of the Act has conferred on him the status of legitimate son and his other pre-existing rights are, in no way, curtailed. After 1976 amendment in Section 16 of the Hindu Marriages Act, the benefits of Section 16 are enlarged and such benefits are also conferred on a son of a marriage which is void under the provisions of the Hindu Marriages Act.

14. Thus, by virtue of Section 16(1) of the Hindu Marriages Act, as amended in the year 1976, an illegitimate son can be equated with the natural son and be treated as "co-parcener" for the properties held by the father, whether the properties be originally joint family properties or not. The only limitation is that during the life-time of the father, the illegitimate son of a void marriage is not entitled to seek partition. He can seek partition only after the death of his father.

15. Admittedly, in this case, there was already partition between Chinna Perumal Gounder and his brother and the suit properties were allotted to Chinna Perumal Gounder and the same were in his exclusive possession and enjoyment. As such, the suit properties cannot be said to be joint family properties after such partition. The other restriction that the second defendant cannot claim for partition of his share when the father was alive also does not exist, since his father died in the year 1974 itself. As a matter of fact, the plaintiffs themselves would ask for 2/3 share in the suit properties as an alternative prayer in the suit, in the event of the conclusion by the Court that the second defendant was born to Chinna Perumal

Gounder. This aspect also has been overlooked by both the Courts below and by applying the wrong law, decree has been passed in entirety in favour of the plaintiffs, which in my view, is quite wrong.

16. Under those circumstances, the judgment and decree passed by both the Courts below are modified to the effect that the plaintiffs together would be entitled to 2/3 share in the suit properties and the second defendant would be entitled to 1/3 share in the suit properties. The preliminary decree is passed in the above terms. Thus, the second appeal is allowed. No costs. Consequently, C.M.P. No.8991 of 200 2 is closed.

Index: Yes
Internet: Yes
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To
1.Sub-Judge, Bhavani, Erode.
2.Addl. District Munsif, Bhavani,
Erode.

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